

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 PETER E. JENSEN,

11 Plaintiff,

12 v.

13 METROPOLITAN LIFE INSURANCE
14 COMPANY, et al.,

15 Defendants.

CASE NO. 3:13-cv-5449

ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND

16 THIS MATTER is before the Court on Plaintiff's Motion to Remand (Dkt. #5).

17 Defendant Terex Corporation removed to federal court based on diversity jurisdiction, and
18 Plaintiff seeks to remand to Pierce County Superior Court in Washington. The parties disagree
19 over whether complete diversity exists. Saberhagen Holdings's presence as a properly joined
20 Washington corporation defeats diversity, therefore Plaintiff's Motion to Remand is GRANTED.

21 I. FACTS

22 Plaintiff Peter E. Jensen, an Arizona resident diagnosed with mesothelioma and lung
23 cancer, filed suit in Washington's Pierce County Superior Court on March 22, 2013 against
24 various defendants. Plaintiff claims that Defendants' acts of mining, manufacturing, producing,
or placing into the stream of commerce asbestos-containing products exposed Plaintiff to

1 asbestos during his employment with the U.S. Navy as a heavy equipment operator. Plaintiff
2 claims this exposure proximately caused his diagnosis of mesothelioma and lung cancer.

3 Plaintiff served Defendant Saberhagen Holdings, a Washington corporation, on or about
4 March 27, 2013. Plaintiff served Defendant Terex, a Delaware corporation, on or about May 8,
5 2013. Terex removed the suit to federal district court on the basis of diversity jurisdiction
6 pursuant to 28 U.S.C. §§ 1332 and 1441(b). Terex claims it removed the case based on its
7 understanding and belief that all other Defendants other than Terex and FMC Corporation, (both
8 Delaware citizens) would be dismissed from the suit.

9 Plaintiff seeks Remand arguing that this court does not have jurisdiction because the
10 parties are not diverse. The parties do not dispute that the amount in controversy exceeds
11 \$75,000. It is undisputed that Defendant Saberhagen Holdings is a citizen of Washington state.
12 Plaintiff asserts that Saberhagen was properly joined as a defendant, and its presence in the suit
13 destroys diversity jurisdiction pursuant to 28 U.S.C. §1441(b)(2). If complete diversity does not
14 exist, the case must be remanded back to Pierce County Superior Court.

II. DISCUSSION

A. Legal Standard

17 An action is removable to a federal court only if it could have been brought there
18 originally. 28 U.S.C. § 1441(a). 28 U.S.C. § 1332(a)(1) provides, in relevant part, “The district
19 courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds
20 the sum or value of \$ 75,000, exclusive of interest and costs, and is between . . . citizens of
21 different States.” 28 U.S.C. § 1332(a)(1). The forum-defendant rule limits removal: outside of
22 federal-question jurisdiction, “action[s] shall be removable only if none of the parties in interest

1 properly joined and served as defendants is a citizen of the State in which such action is
 2 brought.” 28 U.S.C. § 1441(b).

3 There is a strong presumption against removal jurisdiction, and federal jurisdiction “must
 4 be rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v. Miles,*
 5 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citation omitted). The defendant always bears the
 6 burden of establishing the propriety of removal. *Id.* If at any time before final judgment, the
 7 court determines that it is without subject matter jurisdiction, the action shall be remanded to
 8 state court. 28 U.S.C. § 1447(c).

9 **B. Diversity Jurisdiction**

10 The federal court’s removal authority in this case turns on the application of the forum-
 11 defendant rule. If Saberhagen is properly in the suit, then its Washington citizenship prohibits
 12 removal under 28 U.S.C. § 1441(b)(2). In support of its claim that removal was proper,
 13 Defendant Terex argues that Plaintiff does not intend to pursue any claims against Saberhagen,
 14 but even if Plaintiff does not dismiss such claims, Saberhagen is only a nominal party who was
 15 fraudulently joined solely to defeat diversity and prevent removal. Defendant’s Response to
 16 Plaintiff’s Motion to Remand (Dkt. #8, at 4). Plaintiff denies these allegations and asserts that it
 17 intends to pursue claims against Saberhagen as a real party in interest.

18 Diversity requires that each plaintiff be a citizen of a different state from each of the
 19 defendants. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089 (9th Cir. 2004) (citing *Morris v. Princess*
 20 *Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)). However, if a non-diverse defendant has
 21 been “fraudulently joined,” then that party’s presence is ignored when the court determines the
 22 existence of diversity. *United Computer Systems, Inc. v. AT & T Corp.*, 298 F.3d 756, 761 (9th
 23 Cir. 2002) (citing *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001)).

1 “Fraudulent Joinder” is a term of art. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061,
2 1067 (9th Cir. 2001)(citing *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.
3 1987)). The non-diverse defendant has been fraudulently joined if the plaintiff fails to state a
4 cause of action against that defendant and that failure is obvious according to the settled laws of
5 the state. *McCabe*, 811 F.2d at 1339. The removing defendant is entitled to present facts outside
6 of the complaint to establish that a party has been fraudulently joined. *Id.* Doubt concerning
7 whether the complaint states a cause of action is resolved in favor of remanding the case to state
8 court. *Albi v. Street & Smith Publications*, 140 F.2d 310, 312 (9th Cir. 1944).

9 Defendant Terex cannot meet its high burden of showing that Plaintiff fails to state a
10 cause of action against Saberhagen under the laws of Washington. Plaintiff has pled colorable
11 negligence and strict liability claims against Saberhagen, which is enough to show that
12 Saberhagen was not fraudulently joined.

13 First, Terex has not shown that Plaintiff does not intend to pursue its claims against
14 Saberhagen. Terex claims that it received information from Plaintiff’s counsel that it intends to
15 dismiss Saberhagen. Plaintiff explains that Terex inferred this from Plaintiff’s decision to offer
16 dismissals to a number of other defendants, not including Saberhagen. Terex also claims that
17 Plaintiff’s failure to seek immediate relief from the bankruptcy court’s automatic stay of claims
18 against Saberhagen demonstrates that Plaintiff does not intend to pursue these claims. Plaintiff
19 explains that he did not seek immediate relief from the automatic stay in this case because he did
20 not yet feel it was necessary. Furthermore, Saberhagen’s bankruptcy case has been dismissed and
21 the automatic stay lifted. Notice of Dismissal of Bankruptcy of Defendant Saberhagen Holdings,
22 Inc. (Dkt. #12).

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Second, Terex has not shown that Plaintiff does not have colorable claims against Saberhagen. Terex claims that Plaintiff has not alleged facts that would entitle him to relief from Saberhagen, and therefore Saberhagen is a nominal party whose presence in the suit should not defeat diversity jurisdiction. Plaintiff cites facts in the record to support its claim against Saberhagen. Saberhagen's predecessor The Brower Company was an insulation contractor for Boeing's Plant 2 during the time Mr. Jensen worked there. Plaintiff's Reply To Terex Corp.'s Response To Plaintiff's Motion To Remand (Dkt. #10 at 4). Plaintiff alleges that he was exposed to asbestos fibers generated by The Brower Company's contract services. Plaintiff has alleged facts that could entitle him to recovery against Saberhagen.

III. CONCLUSION

Defendant Terex has not met its burden of showing that Saberhagen was fraudulently joined. Saberhagen's presence in the suit as a properly joined defendant defeats diversity jurisdiction and requires remand back to Pierce County Superior Court. The Court will not award fees on this Motion. Plaintiff's Motion to Remand is GRANTED and the case is REMANDED to Pierce County Superior Court. The Clerk shall send uncertified copies of this Order to all counsel and to the Clerk of the Pierce County Superior Court.

IT IS SO ORDERED.

Dated this 29th day of July, 2013.

Ronald B. Lightner

**RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE**